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JAMES E. BRO...

IN THE

Supreme Court of the United States

October Term, 1940

No. 791

[illegible] D. COLLINS,

Petitioner,

vs.

JOHN KELLOGER,

Respondent.

Petition for the Writ of Certiorari to the Supreme Court of California.

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IN THE

Supreme Court of the United States

October Term, 1960.

No. .....

SAMUEL D. COLLINS,

Petitioner,

vs.

JOHN KLINGER,

Respondent.

Petition for the Writ of Certiorari to the Supreme Court of California.

To the Honorable Earl Warren, Chief Justice and to the Honorable Associate Justices of the Above-Entitled Court:

This petition for the writ of certiorari respectfully represents and shows:

I.

Opinion Below.

There was a summary denial of the petition for the Writ of Habeas Corpus without opinion filed by the highest Court of the State of California in which a determination could be had, the Supreme Court of California. (See summary denial of petition in Record.)

II.

Summary and Short Statement of Matter Involved.

The petitioner charges that the Adult Authority of California, an administrative branch of the State Government, in an Ex parte proceeding by resolution, without notice or opportunity to petitioner to defend, increased a fixed sentence of 20 years imprisonment to life imprisonment, contrary to and in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

III.

Basis of Jurisdiction.

The judgment of the State Court sought to be reviewed was entered on November 9, 1960, by the Supreme Court of the State of California in a summary denial of a Petition for the Writ of Habeas Corpus (See summary order attached to Record), and became final 30 days thereafter on December 9, 1960, under Rule 24 of the Rules on Appeal of California Courts.

This Honorable Court has jurisdiction to issue the Writ of Certiorari and review the State Court's judgment under the authority of Article III, Section 2, paragraphs 1 and 2, the Fourteenth Amendment to the Constitution of the United States; Section 237(b) of the Judicial Code of the United States, and the Acts of Congress made and provided in such a case.

IV.

Federal Questions Presented.

1. Was it a violation of due process of law for the Adult Authority, an administrative agency of the State of California to suspend petitioners parole and refix and increase his twenty (20) years fixed term to life imprisonment upon a general resolution made several years prior thereto, without notice or hearing to petitioner?

2. Was it likewise a denial of due process of law by the Supreme Court of California in the summary denial of the Petition for the Writ of Habeas Corpus, without a hearing or opinion as to the reason therefore.

V.

Reasons Relied on for Allowance of Writ of Certiorari.

The petitioner upon conviction of abortion and murder charges was sentenced to State prison for an indeterminate sentence of five years to life on the conviction of murder, and 1 to 5 years on convictions of abortion. The Administrative Agency of the State of California, the Adult Authority of California, empowered to fix indeterminate sentences and grant parole, fixed the petitioner's term of imprisonment at 20 years by aggregating the sentences. The petitioner was released to a Federal Penal Institution to satisfy a criminal judgment theretofore rendered by the United States District Court and upon completion of the fed-

eral term of imprisonment for income tax evasion, the petitioner was released from confinement and returned to his home in Los Angeles, California. The petitioner was forced to submit to the State Administrative Agency's jurisdiction on parole to complete the twenty year sentence, when some 17 days before the fixed sentence expired, with the benefit of good time credits earned, the Adult Authority, by resolution and without notice or hearing to the petitioner, in violation of the requirement of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, suspended his parole and refixed his term of imprisonment at life imprisonment and ordered his return to the State Prison. [R. pp. 2, 6.]

The summary denial of the issuance of the writ of habeas corpus by the Supreme Court of California while in error, was necessary to the determination of the important federal question herein involved by the Supreme Court of the United States.

ARGUMENT.

The State Administrative Agency, in the suspending of petitioner's parole and increasing his fixed term of twenty years to life imprisonment by resolution, is in violation of the due process of law clause of the Fourteenth Amendment.

The procedure employed by the Adult Authority on October 30, 1959, in suspending the defendant's parole and increasing his term from twenty (20) years to life imprisonment, in accordance with Resolution No. 171 adopted 3-6-51, is a most unusual way to administer justice and/or punishment, for what the Board has attempted to do here is to raise a man's fixed term of imprisonment from twenty (20) years to life imprisonment, without proof and without hearing, in an arbitrary exercise of power which the courts deny to themselves, for it is without semblance of due process when one is condemned and punished without hearing or opportunity to defend.

Manner in Which Federal Question Was Raised.

The Federal Question was first raised in the original proceedings by petition for the Writ of Habeas Corpus in the Supreme Court of California [R. pp. 5, 6, and 7], as provided by Article VI, Section 4 of the California, and although the California Supreme Court, in the summary denial of the petition without opinion filed, was in error, such determination was necessary to the jurisdiction of this Honorable Court to determine said federal question on review by Petition for Writ of Certiorari.

Specification of Errors.

I.

Increased punishment by resolution of a State administrative agency is violative of due process of law.

II.

The summary denial of the petition by the State Court is likewise a denial of due process of law.

Authorities Sustaining Jurisdiction.

The following authorities sustain this Honorable Court:

Mooney v. Holohan, 294 U. S. 103;
Cole v. Arkansas, 333 U. S. 196;
In re Oliver, 333 U. S. 257;
Rochin v. California, 342 U. S. 165;
Fourteenth Amendment of the United States Constitution;
Judicial Code, Sec. 237b.
Rule 38 of the Rules of the Supreme Court of the United States.

Federal Question.

The authorities sustaining the Federal Question are as follows:

Mooney v. Holohan, supra;
Cole v. Arkansas, supra;
In re Oliver, supra;
Rochin v. California, supra;
Fourteenth Amendment, United States Constitution.

I.

Is State administrative action by mere resolution increasing a fixed twenty (20) year term of imprisonment to life imprisonment inconsistent with the due process clause of the Fourteenth Amendment?

In reviewing the indeterminate sentence law of California, Penal Code Section 1168 (Added by Stats. 1917, p. 665), inaugurated by the Legislature, the Board of terms and paroles having once fixed a term of imprisonment, could neither decrease or increase the term so fixed. By Stats, 1929, p. 1930, the Legislature, at that time, included in Section 1168 of the Penal Code power of the Board to "redetermine" a fixed term in order to "decrease" but not increase, the term originally fixed by the Board. In 1931 the Legislature again amended Section 1168 of the Penal Code, Subd. (c), as follows:

> "*Change of order of determination:* In case any convicted person undergoing sentence in any of the State prisons commits any infraction of the rules and regulations of the prison board, or escapes while working outside such prison under the surveillance of prison guards, or violates his parole, the Board of Prison Terms and Paroles may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, and make a new order determining such length of time not exceeding the maximum penalty provided by law for the offense for which he was convicted, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State. Such revocation and redetermination shall

not be had except upon a hearing upon the question of such infraction or escape or violation and an adjudication by the Board that such prisoner was guilty thereof, which adjudication shall be final. At such hearing such prisoner, unless outside the walls of the prison as an escapee and fugitive from justice, shall be present and entitled to be heard and present evidence and witnesses in his behalf."

The above Subdivision (c) was the first time in the history of the indeterminate sentence law of California from the year 1917 through the year 1931, that the Board of Terms and Paroles was given authority to increase a fixed term of imprisonment under the conditions set forth therein. This statute remained in effect between the years 1931 and 1941, when the indeterminate sentence law was recodified into part 3 of the Penal Code, Stats. 1941, Ch. 106, at which time Section 3020 of the Penal Code was enacted by the Legislature, authorizing the Board of Terms and Paroles to:

". . . determine and redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, . . ."

Subdivision (c) of Section 1168 of the Penal Code which formerly empowered the Board to revoke a fixed term and increase it for one of the violations mentioned therein was repealed in the recasting of the law.

In the case of *In re Smith*, 33 Cal. 2d 797, the prisoner complained that his term of imprisonment was increased without hearing, and the Court, in denying

the writ of habeas corpus, held that the Legislature in 1941, in re-codifying the indeterminate sentence law, failed to carry over the right to a hearing on parole violation formerly granted as a matter of right under Subdivision (c) of Section 1168, Penal Code. What the Court failed to consider in the *Smith* case was that Subdivision (c) of Section 1168, of the Penal Code, which had not been carried over into Part 3 of the Penal Code, was that provision in the code which granted the Board the power to increase a term of imprisonment after hearing and the taking of evidence, for the State cannot have one without the other, and still remain within the due process of law clause, that one may not be punished without hearing and the right to defend.

While it is true that Section 3020 of the Penal Code states that the Adult Authority may "determine and redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such prisoner shall be imprisoned . . .", it is so clear that it cannot be misinterpreted to include what the Legislature failed to carry over from Subdivision (c) of Section 1168, Penal Code, empowering the Board at that time to increase a fixed term of imprisonment after the prisoner's presence at a hearing, at which time he may present a defense by evidence and witnesses in his behalf.

As Section 3020 of the Penal Code was enacted by the Legislature in 1941, Ch. 106, Sec. 15, for the proof of the Legislature's intent that the Adult Authority may only mitigate and not increase a term of imprisonment once fixed, we need look only to the later enacted stat-

ute of Section 5077 of the Penal Code, added by Stats. 3d Ex. Sess. 1944, ch. 2, Sec. 1, which provides in part as follows:

> "*Any person may be re-examined to determine whether existing orders and dispositions should be modified or continued in force.*" (Emphasis supplied.)

The statute then goes on to state that the granting and revoking of parole and the fixing of sentences shall be determined by the Adult Authority; provided, that the Adult Authority or one member thereof shall interview each prisoner at least once before the Adult Authority determines his sentence.

It should be obvious to the Court, under the holding in the *Smith* case, *supra,* that the purpose behind the legislative act of eliminating a hearing in the fixing of a term of imprisonment, was because the increasing of a term once fixed was also eliminated at the same time by repeal of Subdivision (c) when the indeterminate sentence law was recodified. Section 5077 of the Penal Code allowing the Adult Authority to modify fixed orders or allow them to remain in effect, is controlling over Section 3020 of the Penal Code. The later enacted statute, and the later expressed intent of the Legislature is controlling, for in *People v. Weitzel,* 201 Cal. 116, the Court held:

> ". . . but if one must yield the statute last enacted should control, 'particularly if it be a special act applicable to a particular subject . . . on the theory that is the last utterance of the legislature.' "

In *People v. Dobbins*, 73 Cal. 257, the Court held:

> "It is an old and well settled rule that when two laws upon the same subject, passed at different times, are inconsistent with each other, the last one passed must prevail."

In *People v. Perkins*, 230 P. 2d 353, it was held that the very fact that a statute is amended demonstrates intent to change pre-existing law, and the presumption must be that the Legislature intended to change the statute in all particulars touching on the language materially changed.

Therefore, when the Legislature failed to carry over any of the provisions of Subdivisions (c) of Section 1168 of the Penal Code, into Part 3, which formerly empowered the Board of Terms and Paroles to increase the fixed term after hearing in the presence of defendant with the right to present evidence and witnesses in his behalf, it intended to revert back to the indeterminate sentence law as it was originally written and invoked up until the year 1931, allowing the Board of Terms and Paroles to mitigate, but not increase, a term of imprisonment once fixed.

In the case of *In re McVickers*, 29 Cal. 2d 264, the Court, in determining a matter of punishment under the habitual criminal law, said:

> ". . . the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words or construction of language used in the statute.'"

In the case of *People v. Ralph*, 24 Cal. 2d 575, at p. 581, the Court held:

> "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up 'by judicial grafting upon legislation.' It is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact or as to the true interpretation of words or the construction of language used in a statute."

It is interesting to note that the Federal Court held in *Morehead v. Hunter*, 198 F. 2d 52, at p. 54:

> "The violation of the terms of a parole into being a new offense of which, upon being found guilty in a proper proceeding, one may be punished. This is a new punishment not a part of the original punishment and consists of forfeiture of good time."

We know from the Decision in *Mooney v. Holohan*, 294 U. S. 103, at pages 112 and 113, that administrative officers, like the executive or the judicial officers in the administration of criminal law, may constitute State action within the purview of the Fourteenth Amendment, for that amendment governs any action of the State whether through its legislature, its judicial, its executive or administrative officers.

We also know from *Rochin v. California*, 342 U. S. 165, at p. 168, that:

"The limitations in the main, concern not restrictions upon the powers of the State to define crime—but restrictions upon the manner in which the States may enforce their Penal Codes."

The cases of *In re Hicks* (1938), 28 Cal. 2d 671, and *In re Korner* (1942), 50 Cal. App. 2d 407, were decided on the law as it existed in Subdivision (c) of Section 1168 of the Penal Code, and the cases decided thereafter and relying upon those cases, fall into the pit of error by relying upon a statute that was no longer in effect. It was the *Hicks* and *Korner* cases that resulted in the erroneous decisions of the following cases upon a repealed statute:

In re Borgfeldt, 27 Cal. App. 2d 83;
In re Etie, 27 Cal. 2d 753;
In re Payton, 28 Cal. 2d 94;
In re Smith, 33 Cal. 2d 797.

It is also interesting to note that the United States Court of Appeals, for the Ninth Circuit, in its decision on the "Bob Wells" case, *Duffy v. Wells*, 201 F. 2d 503, gave full recognition to Section 5077 of the California Penal Code as the authority under which a term of imprisonment is fixed by the Adult Authority, wherein the court said:

"It has long been established that the Legislature intended that such sentence is fixed for life, until the California Adult Authority acting under Section 5077 of the California Penal Code shall fix a shorter time."

Thus, once the Adult Authority fixes a term of imprisonment under Section 5077, as they have in the

present case at fifteen (15) years on the aggregated terms, the Adult Authority was restricted to modifying that term or to leave the existing order remain in effect, and the defendant's term of imprisonment, therefore, expired on December 23, 1959, and his confinement at the present time on the increased term of life inprisonment for an alleged parole violation is in violation of due process of law, equal protection of the laws, and privileges and immunities of law of the Fourteenth Amendment to the Constitution of the United States, and similar provisions of Article I, Section 13, of the California Constitution, and the defendant is entitled to his discharge from imprisonment, confinement and restraint under the $21,000.00 bail fixed by the Superior Court of Los Angeles County pending determination of appeal in Case No. 216641, and Appellate Court No. 2d Criminal 7050. (Affirmance of judgment, reported as *People v. Collins* (November 14, 1960), 186 A. C. A. 366, and petition for hearing denied by the Supreme Court of California on federal ground urged, on January 4, 1961. A petition for the Writ of Certiorari has been filed in this Honorable Court with the present petition.

Prayer.

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court for its review and determination on a day certain named therein, the complete transcript of the re-

ord in the case numbered and entitled on its docket as Crim. No. 6763, *In re*: Samuel D. Collins on habeas corpus Samuel D. Collins petitioner and John Klinger, Superintendent of a State Penal Institution respondent; that the judgment of the Supreme Court of California be reviewed and reversed by this Honorable Court; and that the petitioner may have such other and further relief as may seem just and proper.

Respectfully submitted,

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and

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